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PUC PROJECT NO. 51812

**ISSUES RELATED TO THE STATE OF
DISASTER FOR THE FEBRUARY 2021
WINTER WEATHER EVENT**

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

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**TALEN ENERGY RESPONSE TO REQUESTS
TO RETROACTIVELY RESET PRICES**

TO THE HONORABLE CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS:

In letters submitted to the Public Utility Commission of Texas (“Commission” or “PUC”) on March 1 and 4, 2021, the Independent Market Monitor (“IMM”) of the Electric Reliability Council of Texas, Inc. (“ERCOT”) submitted recommendations to retroactively reset ERCOT market prices. In addition, a number of entities have filed proposals advocating for their own preferred versions of re-pricing alternatives. The Commission should restore certainty in the ERCOT market and let market outcomes stand. Not only is it sound policy to avoid disturbing prior market outcomes, attempts to retroactively change market prices are contrary to established Texas law.

I. Price Certainty Should be Maintained

A fundamental element of a functioning market is price certainty. Price certainty allows market participants to have confidence in market outcomes, which supports the continued integrity of markets. Once market transactions are complete, blanket repricing of those transactions injects doubt into all future market activity. This results in potential challenges to market outcomes if a market participant decides it dislikes a price. Uncertainty and doubt will imperil the proper functioning of a market. The Texas physical and financial natural gas and power markets are complex and intertwined, such that retroactive changes to prices will impact transactions across the entire industry, potentially causing market participants to incur substantial costs to resettle and

litigate those transactions. In addition, those retroactive changes will not reduce the total harm, but merely shift harm to different market participants.

In the March 4 letter, the IMM estimated the cost of pricing the February 18th and 19th period at the value of lost load (“VOLL”) to be \$16 billion of additional costs. That estimate is a theoretical number that does not reflect the actual costs for consumers, or the actual cost incurred by the market. It ignores the fact that many market participants and consumers were not fully exposed to wholesale prices. In reality, most retail electric customers were hedged during this event through their REP and were not exposed to wholesale prices. Therefore, the amounts that retail consumers would see are likely to be far less than \$16 billion. In addition, those costs will potentially be exceeded by the increased cost to resettle bilateral and financial transactions that occurred outside of the real-time market.

The Commission’s February 15th Order appropriately reflected scarcity pricing principles necessary for an energy-only market to succeed. The Commission issued the Order to ensure that the market reflected the scarcity prices reasonably expected during an EEA 3 event. Regardless of whether they agreed with the PUCT Order, market participants made decisions and took action in response to the order that they may not have otherwise taken. Regardless of whether outcomes for some of the market participants were less favorable than others, all market participants relied on the same information to make market decisions. There is no justification for retroactive changes that could impose significant long-term damage to the structure of the market itself.

Finally, fundamental policy concerns weigh against retroactive changes to the PUCT order requiring ERCOT to set the market clearing price at VOLL. PUCT emergency orders are rare, but when necessary, they are an invaluable tool to help stabilize and guide market participants. In this instance, the purpose of the emergency order was to send a clear scarcity pricing signal to

incentivize generators and loads acting as a resource. If such emergency orders have a risk of later evaporating, their future effectiveness will be undermined. Scarcity pricing is needed to incent investment in generating capacity in ERCOT. If investors cannot be certain that when applied, scarcity pricing will be honored, the likelihood of that investment materializing is put at significant risk.

As other parties have correctly pointed out, rolling back the PUCT's order will also have unintended and unreasonable consequences on market participants who incurred costs in power generation and load reduction that were crucial to alleviate the crisis caused by the extreme weather event. *See* Docket No. 51812, Item 94, Letter from Tenaska Energy at 1-2 (Mar. 5, 2021); Docket No. 51812, Item 95, Letter from Enbridge at 1-2 (Mar. 5, 2021). Such distrust could be devastating in a potential future crisis. Furthermore, retroactive rulemaking by the PUCT will undeniably result in litigation, which even on an expedited track could take years. This would not only produce further uncertainty in the industry but would also reflect poorly on Texas markets. *See* Docket No. 51812, Item 72, Letter from Calpine Corporation at 3.

II. Attempts to Retroactively Reprice the Market is Contrary to Well Established Texas Law.

There are at least two ways in which the IMM's suggestion to reprice the ERCOT market would violate Texas law. First, a decision by the PUCT to retroactively change its own order would violate the prohibition against retroactive laws. Second, the IMM appears to misunderstand the nature of the PUCT's order, incorrectly suggesting that the order gave ERCOT the discretion to revise real-time prices downward for energy sold before it ended energy emergency alert ("EEA") level 3 conditions on 9:00 on Friday, February 19th.

A. Retroactive Laws are Prohibited Under Texas Law

As recognized by the IMM, the Commission's February 15 Order was a mandate to ERCOT to set prices at the VOLL,¹ which is \$9,000/MWh.² ERCOT complied with the PUCT's directive and set the market clearing price for energy at VOLL until the EEA3 condition ended around 9:00 on Friday, February 19, 2021. Despite the IMM's recommendation, the PUCT may not retroactively undo its prior order to adjust prices.

The prohibition against retroactive rules and ratemaking is a "fundamental" principle grounded in constitutional due process requirements and retroactive lawmaking prohibitions.³ "Agency rules and rates are set for the future, and not for the past."⁴ Thus, an agency cannot second-guess its decisions to the detriment of those who abided by and relied upon them.⁵ In rare circumstances, retroactive rulemaking is permitted, but this is not such an instance. For an agency to make a rule effective retroactively, two conditions must be satisfied: (1) there must be evidence that the Legislature conferred power upon the agency to effectuate retroactive rules and (2) the action must be permitted constitutionally.⁶ Neither condition is present here.

As to the first requirement, there is no statutory authority permitting the PUCT to retroactively change its order for ERCOT to set the market clearing price at VOLL. The PUCT is

¹ *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Item 61, Letter from IMM to PUCT at 1 (Mar. 4, 2021) ("The IMM agrees with the Commission's Order from February 15, 2021, which mandated that real-time energy prices reflect firm load shed by setting prices at the value of lost load (VOLL).").

² *See Review of Real-Time Co-Optimization in the ERCOT Market*, Project No. 48540, Item 45, Initial Comments of Potomac Economics at 2 (Apr. 15, 2019) ("Since 2014, VOLL has been deemed to be \$9,000/MWh.").

³ *See State v. Pub. Util. Comm'n of Texas*, 883 S.W.2d 190, 199 (Tex. 1994) (citing *Railroad Comm'n of Texas v. Lone Star Gas Co.*, 656 S.W.2d 421, 425 (Tex. 1983)).

⁴ *All Saints Health Sys. v. Texas Workers' Comp. Comm'n*, 125 S.W.3d 96, 104 (Tex. App.—Austin 2003, pet. denied) (citing *Lone Star Gas Co.*, 656 S.W.2d at 425).

⁵ *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 390 (1932) ("Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time. . . subject a carrier which conformed thereto to the payment of reparation. . .").

⁶ *Texas Ass'n of Long Distance Tel. Companies (TEXALTEL) v. Pub. Util. Comm'n of Texas*, 798 S.W.2d 875, 881–82 (Tex. App.—Austin 1990, writ denied) (citing *Southwestern Bell Tel. Co. v. PUC*, 615 S.W.2d 947, 953 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.)).

a “creature of the legislature,” and “has no inherent authority.”⁷ Because the legislature has not granted the PUCT the authority to retroactively change an emergency order of the kind entered here, any attempt to do so would be invalid.⁸

As to the second, under both the due process clause of the Fourteenth Amendment to the United States Constitution and the express prohibition of retroactive laws in Article I, Section 16 of the Texas Constitution, “the setting of a retroactive effective date for a rate change has been characterized as prohibited retroactive ratemaking.”⁹ Even though the rate here was set by this Commission, and not directly by the Legislature, “the setting of utility rates is a legislative function, even if carried out by administrative agency; therefore, utility rates, like any other legislation, generally can have only prospective application” and cannot be used to recoup losses or gains incurred under prior legal rates.”¹⁰ Thus, a retroactive change by the PUCT of its order directing ERCOT to set the market clearing price at VOLL would not pass constitutional muster. Indeed, in some discrete instances such an order might even rise to the level of a taking.¹¹

B. The PUCT Order was Clear

The IMM also appears to misunderstand the nature of the PUCT’s order, incorrectly suggesting that the order allowed ERCOT to revise prices downward before it ended the EEA-3 at 9:00 on Friday, February 19th. The IMM suggests that the PUCT ordered ERCOT to set the market clearing price to VOLL only when load was actually being shed at ERCOT’s orders. Thus, the

⁷ *Pub. Util. Comm’n of Texas v. GTE-Sw., Inc.*, 901 S.W.2d 401, 407 (Tex. 1995).

⁸ *Id.*

⁹ *GTE-Sw., Inc.*, 901 S.W.2d at 406 (citing *Public Util. Comm’n v. United Fuel Gas Co.*, 317 U.S. 456, 464 (1943); Stefan H. Krieger, *The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings*, 1991 U.I.L.L.REV. 983, 1009–1012 (1991)).

¹⁰ *GTE-Sw., Inc.*, 901 S.W.2d at 406 (quoting *TEXALTEL*, 798 S.W.2d at 882).

¹¹ See *City of Corpus Christi v. Pub. Util. Comm’n of Texas*, 51 S.W.3d 231, 241 (Tex. 2001) (citing *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51 (1936) (explaining constitutional limits on a legislature’s ratemaking authority)).

IMM concludes that ERCOT made a mistake when it “exceeded the mandate of the Commission by continuing to set [prices] at VOLL long *after it ceased the firm load shed.*”

While ERCOT lifted its last load shed instruction at 23:55 on February 17, 2021, it nevertheless remained in EEA 3—during which load shed can still be ordered—until approximately 9:00 on February 19, 2021. Although the load shed instructions had ceased, many thousands of customers remained without power due to storm damage and because some areas required manual reconnection to the system.¹² In addition, an additional 40,000 MW remained on forced outage due to the event.¹³ In light of those conditions and the terms of the PUCT’s order, it was necessary for ERCOT to keep the market clearing price at VOLL so that scarcity pricing signals would continue to account for any remaining load that had not been restored and for additional load shed that might have been ordered during the EEA 3. Only when the EEA 3 was lifted at 9:00 on Friday, February 19th, could ERCOT revise downward the market clearing price without violating the PUCT’s mandate.

There has also been some suggestion that the PUCT and/or ERCOT should retroactively adjust the end-date of the \$9,000 per MWh VOLL from February 19, 2021, to 0:00 February 17, 2021 pursuant to ERCOT Nodal Protocol § 6.3(6)(a), which permits ERCOT to correct pricing errors under certain circumstances. However, this section of the ERCOT Nodal Protocols would not apply in this circumstance and ERCOT cannot act contrary to the PUCT’s February 15 Order. The language of §6.3 of the Nodal Protocols, restricts ERCOT’s ability to retroactively change prices in instances where specific administrative errors occurred, or if prices were inconsistent

¹² ERCOT Press Release, February 18, 2021, Majority of customers are able to be restored, but electric companies still restoring outages in the field.

¹³ *Id.*

with the Nodal Protocols or the PUCT rules.¹⁴ The pricing applied by ERCOT as ordered by the PUCT was not the result of administrative errors but was intended to account for scarcity pricing during the EEA 3 event. Further, the implementation of the pricing was consistent with the Nodal Protocols and the PUCT rules. Therefore, Nodal Protocol § 6.3 does not apply here.

ERCOT's authority to operate the energy market is established through a delegation from the PUCT as allowed under PURA § 39.151.¹⁵ Accordingly, ERCOT only has the authority as granted it by the PUCT and is limited by the PUCT's orders and rules.¹⁶ The ERCOT protocols do not grant ERCOT the authority to implement protocols in direct contravention with a clear PUCT Order that required scarcity pricing to be applied through the EEA 3 event.

III. Conclusion

Market certainty needs to be maintained in ERCOT, and the law of Texas should be followed. Talen Energy appreciates the careful deliberation of this important repricing matter by the Commission given the large financial consequences of all parties involved and the legal implications of the decision. The PUCT exercised its authority based on market conditions during an extreme weather event, and entities throughout the industry relied on that decision in their operations and market behaviors. To reassess and alter that decision now, would be to the detriment of the very people who were meant to—and indeed did—rely on that order. The

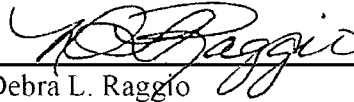
¹⁴ ERCOT Nodal Protocol § 6.3(4) gives ERCOT the ability to retroactively correct prices only for certain administrative errors, including (1) data input errors; (2) data output errors; (3) hardware/software errors; and (4) in specific circumstances resulting in prices that conflict with ERCOT Protocol language or the PUCT substantive rules.

¹⁵ See PURA § 39.151(d) requiring the PUCT to “adopt and enforce rules relating to the reliability of the regional electric network an accounting for the production and delivery of electricity among generators and all other market participants or may delegate to an independent organization” such responsibilities. In addition, § 39.151(d) specifies that the PUCT has “complete authority to oversee and investigate the organizations finances, budget, and *operations* as necessary to ensure the organization’s accountability and to ensure that the organization adequately performs the organizations functions and duties.” (emphasis added)

¹⁶ See e.g. 16 TAC § 25.361(b) delegating the functions of an independent organization contemplated under PURA § 39.151 to ERCOT.

Commission should stay the course decided at the March 5th open meeting and let prices stand without retroactively reworking market outcomes.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "DRaggio", is written over a solid horizontal line.

Debra L. Raggio
Senior Vice President, Regulatory and External
Affairs Counsel
Talen Energy

Date: March 11, 2021